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THE TOBACCO LITIGATION: A TENTATIVE ASSESSMENT

Robert L. Rabin*

INTRODUCTION

For forty years, beginning in the early 1950s, smokers suffering from lung cancer sued tobacco companies for the harm they suffered with hardly a notice in the world of public affairs.¹ This surely did not reflect widespread ignorance of the public health risks posed by tobacco. On the contrary, by the early 1990s, the vast majority of adults in this country were well aware of the association between smoking and lung cancer, reflected in part by the steady decline in per capita smoking over the same time period.²

But then, the tobacco industry's fortunes—at least in avoiding adverse publicity—shifted dramatically. The shift occurred as plaintiffs' lawyers filed class action tort suits and collaborated with attorneys general in pursuing state reimbursement claims for Medicaid and other health care expenditures.³ This activity on the litigation front soon led to a long-term obligation of \$240 billion by the industry, in 1998, to settle the state reimbursement cases, and continues to bedevil the tobacco companies in the tort system, where massive punitive damage awards hover like a storm cloud over the industry.⁴ There is

* A. Calder Mackay Professor of Law, Stanford Law School. Many thanks to Steve Sugarman for helpful suggestions and Bernadette Meyler for excellent research assistance. A more detailed discussion of the developments and analysis addressed in Parts II and III of this comment can be found in Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in *REGULATING TOBACCO*, Ch. 7 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

1. On the first two waves of tobacco tort litigation, 1954-65 and 1983-92, see Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Litigation*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110 (Robert L. Rabin & Stephen D. Sugarman eds., 1993), discussing the singular lack of success by plaintiffs in that era.

2. In fact, by 1986, 92% of the public, including 85% of then-current smokers, believed that smoking causes lung cancer. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT TO THE SURGEON GENERAL* 190 (1989) (citing the 1986 D.H.H.S. Adult Use of Tobacco Survey).

3. The adverse publicity was not limited to the litigation forum. See PETER PRINGLE, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* 77-81 (1998).

4. On the state settlements, including the Master Settlement Agreement, see Milo Geyelin, *States Agree to \$206 Billion Tobacco Deal*, *WALL ST. J.*, Nov. 23, 1998, at B13. On the continuing threat of punitive damage awards, see *infra* text accompanying notes 19-25, 65-68.

no final accounting in sight; indeed, even a blockbuster set of tort awards that bankrupted the industry would not lead to tobacco vanishing from the scene. As long as a substantial number of adults continue to smoke—at present, about twenty-five percent nationwide⁵—it seems safe to say that cigarettes will be legally available. Hence, some 430,000 premature deaths annually from smoking remain a pressing public health concern, particularly in light of statistics indicating no downward trend in youth smoking.⁶

In view of these shifting and uncertain fortunes, it seems appropriate, although hazardous, to take stock of what meaning can be assigned to the tobacco litigation almost a decade after it rose to such public prominence. More specifically, I will offer some thoughts on the impact of the litigation at this point, taking into account not just its successes and failures, but also its place in the broader array of strategies for reducing tobacco use. I will then offer some perspectives on what the tobacco litigation has meant for other related ventures, such as handgun and lead paint litigation, that similarly rely on tort-type claims to promote public health and/or safety goals.

But even this broader assessment of impact would be incomplete if it failed to take into account the potential secondary effects of the tobacco litigation; in particular, how this litigation has served as an educational medium and a means of generating fees that are in turn used to bankroll other litigation-based social reform efforts. In the course of my assessment, I will discuss these considerations that extend beyond the realm of precedent value. If, as things now stand, tort law cannot be de-politicized, it can perhaps be de-mythologized to some extent. This comment is an effort to that end.

II. LITIGATION ON FOUR FRONTS: A TENTATIVE ASSESSMENT

By now, the revelations of tobacco industry chicanery that surfaced in 1993 are an oft-told tale that need not be recounted here.⁷ Suffice it to say that a considerable number of sophisticated plaintiffs' attorneys who had previously shown no enthusiasm for involvement in tobacco litigation entered the fray with an especial eye to the prospects

5. NAT'L CENTER FOR HEALTH STATISTICS CENTERS FOR DISEASE CONTROL AND PREVENTION, *HEALTHY PEOPLE 2000 REVIEW* 54 (1998-99).

6. NAT'L CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, *HEALTHY PEOPLE 2000 REVIEW* 51 (1998-99). Compare NAT'L CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, *HEALTHY PEOPLE 2000 REVIEW* 50 (1995-96)(stating that youth smoking was increasing) with NAT'L CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION, *HEALTHY PEOPLE 2000 REVIEW*, 51 (1998-99)(indicating that youth smoking may be leveling off).

7. See PRINGLE, *supra* note 3, at 138-59.

of class action litigation against the industry. The opening salvo on the tort front was *Castano v. American Tobacco Co.*,⁸ a nationwide class action filed in the federal district court in Louisiana. In a novel variation, a second front was opened in a Mississippi state forum with the filing of a state claim for reimbursement of health care expenditures on behalf of impecunious smokers.⁹ At roughly the same time, the growing sensitivity to claims of harm from exposure to environmental tobacco smoke triggered a class action alleging secondhand smoke-related disease.¹⁰ And finally, the long-standing claims of individual smokers were revitalized.¹¹

As mentioned, none of these initiatives has come to closure. But taking a vantage point somewhat removed from the field of battle, what can be said about the consequences of these endeavors?

A. Class Action Tort Claims

Although the *Castano* class potentially represented upwards of forty million claimants, the case was in a sense narrowly conceived. Rather than resorting to the conventional claim for health-related damages from smoking, the *Castano* lawyers made nicotine addiction the centerpiece of their case. The class was framed to include smokers medically diagnosed as addicted and those who had been medically advised to quit but had not yet done so. This narrower characterization of harm resulting from industry conduct linked nicely with the developing evidence that tobacco executives engaged in a disingenuous pattern of conduct in which they strove to conceal and misrepresent information about the addictive properties of nicotine—indeed, in which they appeared to manipulate the content of nicotine in tobacco products.

In denying the industry's effort to get the case dismissed, the trial judge found the technical requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure dealing with class actions were satisfied. In essence, the judge found that questions common to the class predominated over individual questions, and that the class action was a superior vehicle for litigating the questions. He reached these conclusions and certified the class as to two critical issues: 1) whether the industry had engaged in a fraudulent course of conduct; and 2) if so, whether punitive damages were warranted. With regard to more particularistic issues of individual reliance and a case-by-case need for

8. 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

9. *See infra* text accompanying notes 26-46.

10. *See infra* text accompanying notes 47-58.

11. *See infra* text accompanying notes 59-72.

medical monitoring, the trial judge decided that it would be necessary to resolve these claims at a later stage, perhaps through carving out subclasses. By resorting to this bifurcated approach, the judge held that foundational issues of industry responsibility could be tried in a consolidated fashion.

In hindsight, the Fifth Circuit's refusal to uphold the class certification may appear to have been inevitable.¹² But a critical contemporaneous decision by the Seventh Circuit Court of Appeals on the propriety of class action treatment of mass tort cases almost certainly sealed the fate of *Castano* on appeal. In *Matter of Rhone-Poulenc Rorer*,¹³ Judge Richard Posner, writing for a panel of the appellate court, decertified a class action brought by hemophiliacs suffering from AIDS against blood solids manufacturers.¹⁴ The plaintiff class based their argument for liability on the defendants' alleged failure to take reasonable care in guarding against the known risks of hepatitis (care that would also have protected hemophiliacs from contracting AIDS), and in failing to take adequate care with respect to donors. Judge Posner reasoned that the claims were based on law that varied from state to state, creating potentially significant difficulties in trying the cases in consolidated fashion.¹⁵ And, he added, certification would unfairly require the industry, which had in fact won twelve of the thirteen individual trials that had taken place, possibly to stake its very existence on one roll of the dice. In his view, the requirement would be premature because further individual trials might indicate that mass certification was unnecessary.¹⁶

These arguments clearly resonated with the appellate court in the *Castano* case, which cited and quoted *Matter of Rhone-Poulenc Rorer* repeatedly in its opinion. Publicly, at least, the *Castano* plaintiffs' attorneys took the choice of law concern to be the gist of the Fifth Circuit's decertification decision, and accordingly went on to file "son of *Castano*" cases in a number of state courts, each of which would have to apply only the law of its own jurisdiction.

A careful reading of the *Castano* opinion seems to belie this narrow interpretation.¹⁷ In my view, the *Castano* court saw a considerable number of knotty problems raised by consolidation—such as, the arguably individual determinations of reliance, comparative fault, con-

12. See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996).

13. 51 F.3d 1293 (7th Cir. 1995).

14. *Id.*

15. *Id.* at 1300-01.

16. *Id.*

17. For discussion, see Susan Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336 (1999).

sumer expectations, and actual damages—that would need to be confronted at some stage, even if they could be disregarded in an initial phase of the trial. And most significantly of all, these issues potentially would have to be faced for some forty million claims generated by *Castano* itself. In sharp contrast, there were about one hundred or so ongoing individual claims at the time *Castano* was decided—claims that might wither away or remain at about the same quantitative level if tobacco cases continued to be brought individually.

The aftermath of *Castano* largely bears out this reading. Virtually all of the second-round *Castano* cases were either dismissed or languished in state courts, thus contradicting the notion that choice of law was the essence of the tobacco consolidation concern. As of mid-2001, class certification of post-*Castano* cases had been granted and upheld only in the state of Louisiana, but denied or remained in doubt in twenty-five other states.¹⁸

One notable outlier has been *Engle v. R.J. Reynolds Tobacco Co.*,¹⁹ an initially little-noticed Florida state court class action, filed independently of *Castano* (but roughly contemporaneously) by an attorney team with no links to the *Castano* lawyers, who relied on the traditional disease-related basis for claiming injury instead of limiting their sights to an addiction-based theory.²⁰ In 1996, a Florida intermediate court of appeals upheld the certification of a class of some 300,000-700,000 Florida smokers suffering from tobacco-related diseases.²¹ When the Florida Supreme Court refused to hear an appeal by the tobacco industry defendants,²² the stage was set for a phase one trial of the issues deemed suitable by the trial court judge for class disposition: whether the industry had engaged in deceptive conduct; whether the epidemiological evidence established a causal link between smoking and a variety of diseases from which members of the class suffered; and whether punitive damages were warranted.²³ After the jury answered each of these questions in the affirmative, the same jury engaged in subsequent phase two determinations in mid-1999. It

18. Bob Van Voris, *What's Tobacco's Future in the Bush Era?*, NAT'L L.J., Feb. 5, 2001, at A1.

19. *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-8293 CA20 (S.D. FLA 2000), *reh'g denied*, *motion granted*, *Philip Morris, Inc v. Engle*, 746 So. 2d 457 (Fla. Dist. Ct. App. 1999); *writ of error denied*, *R.J. Reynolds Tobacco Co. v. Engle*, 751 So. 2d 51 (Fla. 1999); *subsequent appeal*, *R.J. Reynolds Tobacco Co. v. Engle*, 750 So. 2d 781 (Fla. Dist. Ct. App. 2000).

20. Myron Levin, *Passive Aggressor; Litigation: Lawyer Stanley M. Rosenblatt's Small Firm May Seem an Unlikely Adversary for Big Tobacco, But He's Confident He's Up to the Challenge of His Life*, L.A. TIMES, June 8, 1997, at D1.

21. 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

22. *Engle v. R.J. Reynolds Tobacco Co.*, *rev denied*, 682 So. 2d 1000 (FL 1996).

23. Richard Daynard, *The Engle Verdicts and Tobacco Litigation*, BRIT. MED. J., Aug. 5, 2000, at 312.

found that three class representative plaintiffs were entitled to \$12.7 million in compensatory damages, and in mid-2000, it found that punitive damages for the entire class were warranted in the astronomical sum of \$144.8 billion.²⁴ Subsequently, the trial court judge upheld the award and, not surprisingly, the industry appealed.²⁵

Whether the plaintiffs' victory in the *Engle* case will survive is highly uncertain. Massive punitive damage awards are routinely cut back on appeal, and this award also bears the strikingly unorthodox feature of appearing to put the cart before the horse: Ordinarily, both the size of a punitive damage award and its allocation would be based on initial determinations of individual compensatory damage award claims—a set of determinations in this case that will not be resolved until claims by all members of the class have taken place (barring settlement). More fundamentally, the sheer prospect of hundreds of thousands of trials, or more realistically, the monumental task of subclassing batches of cases for efficient disposition in a fashion consistent with due process, could lead the appellate courts to overturn the *Engle* case altogether—although any such appellate intervention would seem to have been likely before the mammoth and protracted case proceeded this far. In sum, whether *Engle* will prove to have staying power remains to be seen.

With the significant exception of *Engle*, the *Castano* returns—from the traditional tort perspective of success at trial or favorable settlement—appear to be modest at best at this point. If *Castano* itself seemed doomed from the outset by inevitable appeal to a conservative Fifth Circuit Court of Appeals, one may ask why a consortium of high-powered plaintiffs' attorneys invested so much time and money in the case. Although speculative, a real possibility is that the team was in essence engaged in very high stakes poker. In other words, gambling that certification at the trial court level, which did in fact occur, would create sufficient unpredictability about a potentially catastrophic loss to persuade the industry finally to consider the prospect of settlement. Interestingly, this was precisely the course that unfolded in the contemporaneous state health care litigation, spearheaded initially by a rival group of plaintiffs' attorneys retained by the states.

24. Michael Bradford, *Punitive Tobacco Award Fought: Cigarette Makers Hit with Florida Ruling*, BUS. INS., Nov. 13, 2000, at 2.

25. *Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp 1335 (S.D. Fla. 2000).

B. The State Health Care Reimbursement Cases

The pioneering venture in the state health care reimbursement litigation, the Mississippi case, was filed less than two months after *Castano*, in May 1994.²⁶ In some ways, the two efforts to recover for aggregated claims shared an affinity beyond near-simultaneous filing. Both were undertaken by attorneys experienced in mass tort litigation who were convinced that the unfolding revelations of the tobacco industry's indifference to public health concerns could be translated into mass industry liability, as in asbestos litigation.²⁷ But the health care reimbursement claim, which would soon be replicated in one state after another across the nation, rested on a very different premise from *Castano*. Although the reimbursement claim was based on precisely the same tort-type conduct, the state's theory of recovery was, in fact, not based on products liability law because the state was not a "direct" victim suffering from a tobacco-related disease. Instead, Mississippi and the states that were to follow its lead argued for relief on equitable grounds such as unjust enrichment.²⁸

In essence, the states' legal theories, which later came to include statutorily based claims, such as violation of consumer protection laws, asserted that the industry's deceptive and misleading conduct constituted a wrong against the public, as well as against individual smokers. In arguing unjust enrichment, the claim was for restitution of public tax funds that were allocated to treating impecunious smokers whose health problems were allegedly the industry's responsibility. A similar theory, wrongfully profiting at the expense of the public, undergirded claims of conspiracy and consumer fraud, particularly those targeted against industry tactics aimed at making smoking attractive to underage youths.²⁹

In reality, these theories were largely untested, and the claim that the state's interest was independent of and distinct from the individual smoker's generally rested on a shaky foundation.³⁰ Untested or not,

26. PRINGLE, *supra* note 3, at 55.

27. *See id.* at 13-15.

28. *See id.* at 30-32.

29. For a detailed account of the strategy relied on in one key state, Minnesota, see Gary L. Wilson and Jason A. Gillmer, *Minnesota's Tobacco Case: Recovering Damages without Individual Proof of Reliance under Minnesota's Consumer Protection Statutes*, 25 WM. MITCHELL L. REV. 567 (1999).

30. Consider, for example, the claim of unjust enrichment. The industry was only "unjustly enriched," presumably, if it profited from harm for which it should have been held legally responsible. But this sounds suspiciously circular. Industry responsibility presupposes smoker non-responsibility, which is precisely the issue at the core of the individual cases. Similarly, a public nuisance or conspiracy claim rests on the wrongful imposition of harm on the public — where "wrongful" once again arguably raises individual issues of reliance and comparative re-

the theories of recovery multiplied to include deceptive advertising, antitrust violations, federal Racketeer Influenced Corrupt Organizations (RICO) claims, unfair competition, a variety of fraud allegations, and in at least two states, Florida and Massachusetts, statutory claims based on the enactment of specific health care cost recovery legislation.³¹ The number of states bringing suit also multiplied. By the summer 1997, the roster had grown to forty states.³² Blue Cross and labor union insurers were devising parallel lawsuits, and, in California, cities and counties had joined in the fray.³³

Then, after months of rumors, in June 1997, the states and the major tobacco companies reached a "global settlement"—in reality, a detailed legislative proposal that was presented to Congress as an effort to virtually extinguish the tobacco wars. The tobacco industry, which for more than forty years had proudly proclaimed its invincibility from product liability, was now prepared to underwrite the largest civil settlement ever by paying \$368.5 billion over twenty-five years to reach closure on this front.³⁴

Beyond doubt, the June 1997 agreement was a testament to the awesome threat posed by the litigation strategy. What the industry was willing to buy, at a very considerable price, was relief from litigation uncertainty. This latter point is underscored by the quid pro quo concessions offered by the anti-tobacco forces in the proposal. Under the plan, the state health care reimbursement suits would have been

sponsibility, even if the tobacco companies misrepresented health information. Moreover, in purely economic terms, the claim for recovery of health care costs would seem to be interlocked with the excise tax payments levied on the industry, if not—as some economists argued—the net health cost savings to social welfare programs from premature deaths of smokers, as well. Compare W. Kip Viscusi, *A Post Mortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523 (1999) with Gary T. Schwartz, *Tobacco, Liability, and Viscusi*, 29 CUMB. L. REV. 555 (1999).

31. PRINGLE, *supra* note 3, at 55 (noting that Florida and Massachusetts passed laws permitting the state to recoup Medicaid costs from the tobacco industry); Bryce A. Jensen, *From Tobacco to Healthcare and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1332, 1346, 1358-61 (2001) (explaining the allegations of deceit and fraud against tobacco companies and the basis for RICO claims); Ed Dawson, *Legigation*, 79 TEX. L. REV. 1727, 1733 (2001) (referring to antitrust suits against the tobacco industry).

32. Doug Levy, *Tobacco Turns Over New Leaf, Critics Say Proposed Deal Leaves Bad Taste in Mouth*, USA TODAY, June 23, 1997, at 1B.

33. See Milo Geyelin, *Second Wind: Is Big Tobacco Reeling? Maybe Not; It Wins New Round in Court*, WALL ST. J., June 5, 1998, at A1.

34. In addition, the proposed legislative package would have bound the industry to an array of public health proposals, including acknowledgment of FDA jurisdiction to engage in constrained regulation of nicotine; agreement to a "look back" provision under which the industry would have been subject to fines linked to failure to reduce underage smoking according to targeted goal and timelines; and bans on billboard advertising, use of human and cartoon figures in ads, and brand-name sponsorship of sporting events and promotional merchandise. See Milo Geyelin, *The Settlement: Terms of the Tobacco Pact*, WALL ST. J., June 23, 1997, at B10.

settled, and the industry would have been granted immunity from all other forms of class action. Thus, in one fell swoop, the industry would have eliminated its greatest nightmare—the prospect of catastrophic loss from a cluster of state recoupments, certified classes of tort claimants, or third-party sources, such as Blue Cross or union health plans, successfully convincing juries that the industry's past course of conduct warranted potential multibillion dollar recoveries in compensatory and punitive damages for the legions of injury victims represented in the particular cases. Moreover, under another provision in the settlement plan, there would have been no punitive damages allowed in individual cases for industry conduct prior to the enactment by Congress of the legislation. Once again, this provision directly targeted a massive source of uncertainty—the prospect of a breakthrough in individual cases with one jury after another reacting with vehemence against the narrative of industry deceit. A third provision would have capped the total annual liability for awards on future individual claims at five billion dollars, which is a considerable sum, but nonetheless a fixed cap that would contribute from yet another perspective to the predictability that the industry sought.³⁵

There were other restrictions on litigation as well, but the point is clear. The state health care cases may have rested on dubious theoretical premises, but a realistic assessment of the threat presented by potential catastrophic loss litigation requires more than just finely honed theoretical analysis. By mid-1997, the industry faced the prospect of being sued by virtually every state in the country, represented on a retainer basis by a cadre of the most experienced and skilled tobacco lawyers, pressing a variety of common law and statutory claims. Other third-party claims lurked in the background. The documents told a tale of industry deceit and indifference to public health considerations. Could trial court judges in every, or virtually all, state health care recovery cases be counted on to enter summary judgment, or would the industry be at the mercy of juries exposed to the tale of industry wrongdoing?

What the negotiating parties failed to recognize was that once their “settlement” reached the halls of Congress, it would take on a life of its own. Almost immediately, as the wave of anti-industry public sentiment crested, a far more draconian legislative proposal emerged. The McCain bill,³⁶ as amended, would have obligated the industry to pay \$516 billion over twenty-five years, and, even more strikingly, the

35. *Excerpts from Agreement between States and Tobacco Industry*, N.Y. TIMES, June 25, 1997, at B8.

36. S. 1415, 105th Cong. (1988).

bill incorporated virtually all of the earlier-negotiated public health provisions. Moreover as amended, the bill would have eliminated the industry's hard-fought quid pro quo, which was the litigation immunity provisions. Perhaps inevitably, a reversal of the legislative tide occurred. It was bolstered by an urgent industry advertising blitz and the backing of industry congressional supporters. In the end, no federal legislation was enacted.³⁷

As the congressional battle waxed and waned, the industry—perhaps as a strategy to promote a new image in timely fashion—settled individually with the four states that were closest to trial, and that, with one exception (Texas), perhaps presented the greatest threat of a litigation setback: Mississippi, Florida, Texas, and Minnesota.³⁸ In the absence of these settlements, one might well have concluded, as the congressional deliberations collapsed in June 1998, that the third wave aggregation strategy had yielded precious little beyond massive additional documentation of industry wrongdoing.

But the four individual state settlements did amount to some forty billion dollars, to be paid out over twenty-five years. And within a year, in November 1998, the industry and the forty-six remaining states had negotiated a \$206 billion settlement of all outstanding state health care reimbursement claims, which was considerably less in industry payout than the failed June 1997 agreement. On the other hand, the new agreement contained none of the immunity provisions from class action litigation and punitive damages included in that earlier package.³⁹

In the end, it is difficult to assess the significance of the health care reimbursement litigation. The so-called Master Settlement Agreement, which extinguished any further liability of the industry to the states, contained a scaled-back version of the public health provisions in the earlier-negotiated 1997 agreement with some remaining restrictions on advertising and promotion aimed at the youth market: Billboard advertising was banned, and brand name sponsorship of recreational activities was limited, among other things.⁴⁰ But no longer were there any provisions for industry “look back” penalties if

37. See Jeffrey Taylor, *A New Call for National Tobacco Laws, Prompted by States' Deal, Faces Hurdles*, WALL ST. J., Nov. 17, 1998, at A4.

38. Noam Neusner, *States OK Tobacco Deal*, S.F. EXAMINER, Nov. 20, 1998, at A1.

39. Barry Meier, *Cigarette Makers and States Draft a \$206 Billion Deal*, N.Y. TIMES, Nov. 14, 1998, at A1.

40. Even these limitations are now largely beyond the power of Congress or the states to enact. See *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001) (invalidating a number of state and local restrictions on outdoor advertising of tobacco products on First Amendment and federal preemption grounds).

scheduled reductions in teenage smoking were not met. No longer was there any mention of acknowledging Food and Drug Administration (FDA) jurisdiction, a separate battleground that was then before the Supreme Court, which subsequently ruled against the FDA—on the agency's independent assertion of regulatory authority.⁴¹ No longer was there certainty that the costs of smoking would rise appreciably; estimates were that as a result of the settlement, the price of a pack of cigarettes would rise a relatively modest 35 cents over five years, and the agreement contained set-off provisions for federal tax increases and product sales downturns that served as potential further qualifiers.⁴² Indeed, no longer was there any assurance that the states would spend a significant proportion of the industry payments on smoking reduction programs. To the contrary, it soon became clear that the states were earmarking the funds for a variety of projects unrelated to tobacco control, and, in many instances, bearing no relationship to public health concerns.⁴³ Many argued, with some justification, that the major beneficiaries of the Master Settlement Agreement were the plaintiffs' lawyers who stood to realize billions in attorneys' fees.⁴⁴

Moreover, the third-party claims of insurers and union health funds, modeled on the state reimbursement suits, have been singularly unsuccessful with courts dismissing the claims on remoteness grounds.⁴⁵ Similarly, a federal action seeking reimbursement for Medicare and related federal health expenditures was dismissed, apart from a RICO claim that is now in serious jeopardy under a seemingly unsympathetic presidential administration.⁴⁶ In sum, the industry arguably has sealed

41. *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155 (4th Cir. 1998), *aff'd* *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

42. See Myron Levin et al., *Accord Ends Key Phase in Ongoing Tobacco War*, L.A. TIMES, Nov. 17, 1998, at A1 (stating that the settlement will be funded by a 35-cent-per-pack price increase in cigarettes); Timothy E. Brooks, *Tobacco Settlement: First Step or Misstep? Tobacco Industry is the Winner*, THE PLAIN DEALER, Dec. 11, 1998, at 17B (noting that payments to the states will be reduced if federal taxes are increased or tobacco consumption diminishes).

43. See Michael Janofsky, *Tiny Part of Settlement Money is Spent on Tobacco Control*, N.Y. TIMES, Aug. 11, 2001, at A11; Greg Winter, *State Officials are Faulted on Anti-Tobacco Programs*, N.Y. TIMES, Jan. 11, 2001, at A28.

44. See Henry Weinstein, *Attack Waged on Fees Anti-Tobacco Attorneys Received Legal Services: U.S. Chamber of Commerce calls the \$11.3 billion paid outrageous. It might challenge lawyers in court*, L.A. TIMES, March 15, 2001, at C1. *But see infra* note 84 and accompanying text (discussing the impact of counter-advertising on the individual litigation).

45. See Scott Ritter, *Unions' Claims on Tobacco Firms are Rejected by Appeals Court*, WALL ST. J., May 23, 2001, at B13. *But see*, Marc Kaufman, *Ashcroft Signals Support of Tobacco Lawsuit*, WASH. POST, Oct. 6, 2001, at A4 (asking heads of federal executive agencies to cooperate pursuant to the Justice Department proceeding in a lawsuit).

46. Marc Kaufman & Dan Eggen, *U.S. to Seek Settlement in Tobacco Suit; Anti-Smoking Activists Accuse Justice Dept. of Capitulation*, WASH. POST, June 20, 2001, at A1. *But see*, Marc

off any real concerns about catastrophic liability to third-party claimants at a cost that is unlikely to have a substantial impact on its revenue stream.

C. *Environmental Tobacco Smoke Claims*

Surprisingly, the earliest tobacco class action effort, commenced near the end of 1991, was an action filed on behalf of nonsmoking flight attendants alleging second-hand smoke injuries.⁴⁷ The flight attendants claimed to be suffering from tobacco-related diseases from harm in the workplace—the airline cabins where they were regularly exposed to tobacco-using passengers prior to the 1990 ban on in-flight smoking.

*Broin v. Philip Morris Cos., Inc.*⁴⁸ was brought in a Florida state court by the same husband and wife team, the Rosenblatts, who would later file the earlier-discussed Florida state court class action on behalf of direct victims of smoking-related diseases.⁴⁹ *Broin* was given very little chance of succeeding when it was filed.⁵⁰ This was before *Castano*, let alone any indication that the aggregation technique might generally supplant case-by-case litigation. Moreover, secondhand smoke harm had not yet attracted the general attention that it would after the publication of the 1992 Environmental Protection Agency report designating environmental tobacco smoke as a known human lung carcinogen with no established safe level of exposure.⁵¹

Bold as it might seem, *Broin* had major points in its favor: First and foremost, a sympathetic plaintiff class (flight attendants) that could not be tarred with the assumed risk defense. Imagery also seemed likely to work against the industry. Virtually everyone was familiar with the smoke-filled ambience of the smoking section of an airplane and could identify with the sustained, confined exposure of the flight attendants. On the other hand, even after the publication of the Environmental Protection Agency (EPA) report, the epidemiological data on workplace exposure remained very thin; the strongest association between secondhand smoke and pulmonary disease was household

Kaufman, *Ashcroft Signals Support of Tobacco Lawsuit*, WASH. POST., Oct. 6, 2001, at A4 (asking heads of federal executive agencies to cooperate pursuant to the Justice Department proceeding in a lawsuit).

47. *Broin v. Philip Morris Cos.*, No 91-49738 CA (22) (Fla. Cir. Ct.) (settlement Oct. 10, 1997).

48. *Id.*

49. See *supra* text accompanying note 19.

50. See Milo Geyelin, *Flight Attendants Tobacco Trial Nears*, WALL ST. J., June 2, 1997, at B7.

51. U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992).

exposure, especially of young children, which obviously had no direct bearing on the plaintiffs' case.⁵²

But before any of these issues on the merits of the case became salient, there was the threshold question of nationwide class certification. To the surprise of most observers, the trial court's refusal to certify was reversed by the Florida appellate court, and the *Broin* class was certified for trial.⁵³ The court of appeals, in a brief opinion, made the matter seem clear-cut: generic causation and industry course of conduct were questions common to the class, as was an assessment of the egregiousness of defendants' conduct.⁵⁴ The court remarked that any choice of law problems and individual issues of damages could be decided at a later stage, perhaps by recourse to subclassing, notwithstanding some 60,000 potential claims nationwide.⁵⁵

Whether *Broin* would have survived trial is open to serious question. As the court of appeals opinion that approved the parties' subsequent settlement made clear, the defense had arguments of real substance on the merits: no generic causation, no fraud as to second-hand smoke claimants, and preclusion of suit by the statute of limitations, among others.⁵⁶ But in the midst of trial, before these issues could be addressed, a \$349 million settlement was announced.⁵⁷ The tobacco industry had once again demonstrated its vulnerability, just as it did in the roughly contemporaneous settlements of the four state health care reimbursement cases in Mississippi, Florida, Texas, and Minnesota.

On closer inspection, the significance to be attached to the *Broin* settlement is far less clear. Like the individual state agreements, it came in the midst of the industry's effort to build a positive image in support of the congressional debate over a global tobacco settlement. It involved no compensation to the flight attendants themselves; rather, it set up a scientific research foundation and made concessions on the statute of limitations and the burden of proof in any individual flight attendant cases that might be brought in the future. Perhaps most important, it is highly problematic whether it has any wider applicability. In the individual workplace, secondhand smoke cases that followed *Broin*—lung cancer claims brought by a barber for long-term exposure in his shop and by of a nurse who worked for many years in

52. *Id.* at 7-10 to 7-21.

53. *Broin*, 641 So. 2d 888 (Fla. Dist. Ct. App.1994).

54. *Id.* at 890.

55. *Id.* at 891.

56. *Ramos v. Philip Morris Cos.*, 743 So. 2d 24 (Fla. Dist. Ct. App. 1999).

57. *Settlement of Second-Hand-Smoke Suit of Flight Attendants Approved by Judge*, WALL ST. J., Feb. 9, 1998, at B7.

a veterans' hospital—the industry made no concessions and prevailed before juries.⁵⁸ And other occupational groups that might be consolidated are not likely to replicate the widely shared exposure characteristics of the flight attendants, who were themselves still highly vulnerable to a no-causation defense. Thus, in the aftermath of *Broin*, it seems dubious whether secondhand smoke litigation plows new ground that will prove to be fertile.

D. Individual Claims Revitalized

The first chink in the industry's armor on the familiar battleground of individual litigation came in a 1996 case, *Carter v. Brown & Williamson*.⁵⁹ In *Carter*, a Florida trial lawyer, Woody Wilner, convinced a state court jury that the industry's responsibility exceeded that of his client; however, he did not argue that his client was without fault.⁶⁰ In a similarly modest vein, Wilner did not make a claim for punitive damages, despite introducing evidence of the tobacco company's efforts to conceal health-related information.⁶¹ The jury responded affirmatively, entering a verdict of \$750,000 in compensatory damages for the plaintiff's lung cancer.⁶²

Wilner's success and his stated resolve to bring an endless succession of similar cases against the industry, caught the attention of tobacco tort observers, many of whom had written the individual cases off as historical anachronisms in light of the new wave of aggregation claims. As the first rush of enthusiasm for consolidation gave way to the grimmer prospect of long and uncertain struggles in the courts, the simplicity of multiple presentations of *Carter*, reflecting the recast version of the long-standing morality play of individual litigation, offered new hope to tobacco activists.

Soon, however, reality set in. Within the span of two years, Wilner won another case, *Widdick v. Brown & Williamson*,⁶³ but he failed to

58. See *Tobacco Industry Ruled Not Liable in Mississippi Case*, WALL ST. J., June 3, 1999, at A12. See also Terri Somers, *Tobacco Lawsuits Still Viable: Secondhand Smoke Cases Will be Pursued*, S. FLA. SUN-SENTINEL, April 8, 2001, at 1B (detailing post-*Broin* litigation by individual flight attendants and explaining that, in the first such case to be decided, the plaintiff was defeated).

59. *Brown & Williamson Tobacco Corp. v. Carter*, 680 So. 2d 546 (Fla. Dist. Ct. App. 1996), *rev'd*, *Brown & Williamson Tobacco Corp. v. Carter*, 723 So. 2d 833 (Fla. Dist. Ct. App. 1998), *rev. granted*, *Carter v. Brown & Williamson Tobacco Corp.*, 732 So.2d 326 (Fla. 1999), *decision quashed*, 778 So.2d 932 (Fla. 2000), *cert. denied*, *Brown & Williamson Tobacco Corp. v. Carter*, 121 S.Ct. 2593 (2001).

60. PRINGLE, *supra* note 3, at 264-65, 268.

61. *Id.* at 269-70.

62. *Id.* at 265.

63. *Brown & Williamson Tobacco Corp. v. Widdick*, 717 So. 2d 572 (Fla. Dist. Ct. App. 1998).

convince juries that the industry should be held responsible for the health effects of his clients' smoking in another pair of Florida cases.⁶⁴ His scorecard was mixed, as were the signals sent by the handful of jury verdicts in individual cases in the years immediately following *Carter*. In fact, within the short span of three months, between March and May 1999, juries awarded blockbuster verdicts of \$50 million in punitive damages in a California case, *Henley v. Philip Morris, Inc.*,⁶⁵ and \$85 million in an Oregon case, *Williams-Branch v. Philip Morris, Inc.*⁶⁶ But a Tennessee jury rejected the claims of three tobacco litigants, represented by Wilner, and a Kansas jury did likewise. By mid-2000, another multimillion dollar California jury award had been registered, but so too had defense verdicts before juries in Mississippi and New York; and all of the five pro-plaintiff outcomes remained on appeal except for *Carter*, in which the plaintiff's award was finally upheld.⁶⁷ The industry was clearly still contesting these lawsuits on all fronts with vigor. Thunderbolts, nonetheless, continued to strike: Just as it appeared that plaintiffs' awards might be tolerably few and far between, a California jury handed down a three billion dollar punitive damage award in mid-2001.⁶⁸

Putting aside the outcomes in individual cases, what, if any, were the critical differences in the single-plaintiff tobacco tort suits being brought in the 1990s from those brought earlier? In short, the distinction is in the documents. By the late 1990s, a tobacco litigator could build a case against the industry on the voluminous document discovery in the state health care cost recovery suits and the class action litigation, as well as the earlier caches of whistleblower revelations. A narrative could be woven beginning with tobacco officials discussing, in clandestine fashion, the targeting of teenagers before they had developed to maturity and the retention of the adult market through the addictive powers of nicotine. In *Henley*, for example, the plaintiff's attorney put together a package of 790 damning industry documents, and, although the trial judge allowed only ten to be introduced, this

64. Thomas C. Tobin, *Ex-Smoker Savors Tobacco Win*, ST. PETERSBURG TIMES, July 16, 2001, at 1B.

65. No. 995172, 1999 WL 510276 (Cal. Super. 1999).

66. No. 9705-03957 (Or. Cir. Ct. 1999) Reduced by the trial judges to \$25 million and \$32.8 million respectively, but upheld otherwise. *Id.*

67. For discussion, see Robert L. Rabin, *The Uncertain Future of Tobacco Tort Litigation in the United States*, 7 TORT L. REV. 91 (1999); for citation to the subsequent upholding of the award in *Carter*, see *Carter*, 732 So. 2d 326.

68. See Gordon Fairclough, *Philip Morris is Hit with \$3 Billion Verdict*, WALL ST. J., June 7, 2001, at A3. On rehearing, the trial court judge reduced the punitive damages award to \$100 million; defendant has indicated it will appeal. Anna Gorman, *Huge Award to Smoker Cut by Judge Ruling*, L.A. TIMES, Aug. 10, 2001, at B1.

was sufficient to trigger a punitive damage award from the jury of \$50 million, more than twice the punitives that the plaintiff had sought.⁶⁹

Moreover, the reinvention of the wheel, strategy-wise, was now a thing of the past. Plaintiffs' attorneys drew not just on the same now-public documents, but consulted among each other on micro-management issues, such as which documents to rely on, what lines of argument to pursue, and what expert witnesses to call. By 1999, the Tobacco Trial Lawyers Association, an organization dedicated to networking and coordination among those involved in tobacco trial litigation had been formed. By now, the term "trial in a box" has come to characterize plaintiff attorney preparation in the current wave of individual cases.⁷⁰

But as the returns to date indicate, if massive liability awards now seem a possibility as never in the past, the industry still remains armed with effective weapons. Relying on the strongly individualistic strand in American culture, freedom of choice can still be mustered as a powerful defense. This is especially true as the industry shifts ground and confesses to its past machinations—arguing, instead, that it has now reformed its ways under new "enlightened leadership."⁷¹ If the documents eventually come to be viewed as a matter of only historical interest, and if the industry concedes that addiction means it is very hard but nonetheless possible to quit—and *this* plaintiff, unlike so many other ex-smokers knowledgeable of the health risks, did not demonstrate the requisite will power—it may be that a freedom of choice defense will be newly energized.⁷²

Another shift, away from a defense that eventually became an embarrassment, has now taken place. From the outset of the litigation, the industry argued that the causal link between smoking and allegedly tobacco-related diseases had never been conclusively established: Correlation is not causation. This argument, too, finally became an albatross, not just because of the voluminous epidemiological findings, but also because of the hypocrisy revealed in the documents. But the

69. *Henley v. Philip Morris*, 1999 WL 221076 (Cal. Super. 1999) (explaining that plaintiffs had request \$15 million in punitive damages but the jury had returned an award of \$50 million).

70. See Gordon Fairclough, *California May be Hazardous to Big Tobacco's Health*, WALL ST. J., June 8, 2001, at B1.

71. Rick Bragg, *Tobacco Industry has Changed Its Ways, Executive Says*, N.Y. TIMES, June 13, 2000, at A24. But the confessions of past sins are certainly no sure bet before an otherwise-incensed jury, as the \$3 billion award in *Boeken v. Philip Morris* indicates. See Fairclough, *supra* note 70.

72. But there is a possible interplay here between the fruits of the Master Settlement Agreement – the state health care cost reimbursement provisions – and the individual cases. To the extent that MSA funds are allocated to counter-advertising, they may keep the public's attention focused on a message that this is a death-dealing industry.

concession of generic causation does not close the door on arguing that the particular plaintiff has a type of lung cancer not associated strongly with smoking, died from an independent disease, or died from lung cancer but was massively exposed to asbestos, and so forth. Because of the long latency of tobacco-related disease, the plaintiff's life history often creates the possibility of multiple causes of life-threatening illness.

These latter considerations bring us back full circle to the matter of cost. It remains the case, as in the first two waves of litigation, that expert witnesses are central to trying a tobacco tort case. The documents do not change this critical feature of the cases. The etiology of tobacco-related disease frequently requires the testimony of a pathologist, a pharmacologist, an oncologist, an epidemiologist, an addiction specialist, and public health experts. Aside from the health perspective, there is frequently the need for experts in marketing, promotion, and product design aspects of the case. As long as the plaintiff's risk-taking proclivities remain an element of the defense strategy, a laundry list of character witnesses from the plaintiff's past with corresponding pretrial deposition and interrogatory costs is likely to be a staple of the cases. In short, the documents, as a somewhat standardized package, go part of the way towards reducing the costs of tobacco tort litigation. But only part of the way. The cases are likely to remain expensive and time-consuming propositions as long as they are vigorously contested by the industry, and there is no reason to think that the defense needs to win *every* case in order to maintain an affordable product.

III. A PUBLIC HEALTH PERSPECTIVE ON THE TOBACCO LITIGATION

Studies indicate that about 430,000 premature deaths occur annually in the United States as a result of tobacco use.⁷³ This is an enormous figure that accounts for the major attention paid to the problem in the public health community. But what is the "appropriate" level of mortality and serious disease from smoking? None at all? The numbers that would nonetheless occur if smokers were fully informed of the health risks of smoking? And in assessing the case for regulatory intervention, how does addiction fit into the picture? Or the fact that most smokers take up the habit at an immature age?

These bedrock philosophical questions about how much smoking a society should tolerate take us far beyond the scope of this com-

73. See NAT'L CENTER, *supra* note 5.

ment.⁷⁴ Nonetheless, it is possible to discuss the contribution that tobacco litigation has made to the control of smoking along a number of dimensions. In traditional tort terms, the litigation can be evaluated from a deterrence perspective. From a broader public health vantage point, the litigation can be viewed as one among many strategies currently employed to reduce smoking, and the question can be asked whether litigation has had a positive interactive effect with these other approaches. Finally, the tobacco litigation can be evaluated in terms of its secondary consequences as a medium for educating the public. In the following discussion, I will consider each of these perspectives.

A. Litigation as a Regulatory Regime: Deterrence

For a generation, a principal theme in tort theory has been the articulation of the deterrent role of tort.⁷⁵ This theme has been particularly evident in the modern development of liability in tort for product injuries—a domain that includes smoking-related harm. Deterrence theory has provided the underlying foundation for claims of inadequate warning and defectively dangerous design. In the former instance, the argument from a tort perspective has been that imposing liability on tobacco manufacturers would create incentives to warn the public more adequately about the health and addiction risks of smoking. In the latter case, the claim is that liability would create incentives to take all reasonable steps to manufacture a safer cigarette.⁷⁶ Tobacco manufacturers, in turn, argue that smokers are the better-cost avoiders because they are fully aware of the risks of smoking and can decide whether those risks are outweighed by the satisfaction derived from smoking. A market system such as ours, the argument goes, does not seek to eliminate accidental harm—we do, after all, build high-speed roads and allow risky activities such as skiing. Rather, the system seeks to optimize harm by allocating injury costs to the party best able to take cost-efficient measures for reducing injury.

This is the theory. In the real world of tobacco litigation, however, deterrence considerations operate so haphazardly as to lose virtually all meaning. The major costs imposed on the tobacco industry through nearly a half-century of litigation have been the \$206 billion

74. For discussion of these issues, see JACOB SULLUM, *FOR YOUR OWN GOOD: THE ANTI-SMOKING CRUSADE AND THE TYRANNY OF PUBLIC HEALTH* (1998); ROBERT GOODIN, *NO SMOKING: THE ETHICAL ISSUES* (1989).

75. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

76. See Jon Hanson & Kyle Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-based Regulation*, 107 *YALE L.J.* 1163 (1998).

settlement with the states, the associated billions in earlier settlements with four individual states, and the untold millions paid to the industry lawyers to contest liability on all fronts—estimated in mid-2000 to be in the neighborhood of \$900 million annually.⁷⁷ The cost of the state settlements bears no rational relationship to any intelligible notion of appropriate deterrence. It represents nothing more than the political outcome of what the traffic would bear after four years of jousting with the states over public health care costs (supplemented later in the litigation by a variety of unfair business practice claims). Similarly, the massive litigation costs of a half-century of tort warfare do not conform to a fine-tuned theoretical objective of internalizing accident costs.

This is not to say that the massive financial expenditures imposed on the industry to buy a measure of peace have had no regulatory effect on smoking. To the extent that these costs are internalized in the price of tobacco products sold in the future, they are reflected in price increases and affect demand for tobacco. Reportedly, sharp price increases, beginning after the multi-state settlement in late 1998, resulted in a drop in domestic cigarette consumption of about seven percent in 1999.⁷⁸ Rather, the point is that the costs bear no particular relationship to the goal of imposing a burden on the industry that reflects its proper responsibility for the disease-related harm associated with smoking.

Nothing about the mixed record of litigation success against the industry since the mid-1990s changes this conclusion. To the extent that these victories stand on appeal, they will sharply underscore the massive uncertainty and potential for catastrophic loss arising from punitive damage awards. But these punitive damage awards, in turn, reflect no more than isolated resolutions of the morality play of victim versus industry in which a particular jury decides to “send a message” to the industry. Again, a string of these awards will affect price and consequent demand. Indeed a groundswell of individual awards or even a single multibillion-dollar aggregate award might threaten the financial viability of the industry. However, this affords no clear signal whether from a public health or economic efficiency perspective, tobacco litigation is having the desired impact on smoking.⁷⁹ And

77. Milo Geyelin & Gordon Fairclough, *Taking a Hit: Yes, \$145 Billion Deals a Huge Blow, But Not a Killing One*, WALL ST. J. July 17, 2000, at A1.

78. *Id.*

79. In fact, insolvency itself would arguably have only a minimal impact on the availability of tobacco—albeit perhaps under a rather different regime of promotion and distribution after corporate reorganization in bankruptcy.

suppose that the litigation essentially dried up through a conceivable combination of reversals on appeal and unsympathetic juries. Would the urgency of the public health concern be any less?

In any event, it seems apparent that tort liability is an exceedingly blunt weapon for doing battle with tobacco on the consumer demand front. Clearly, the industry can no longer stand behind its long-time boast that not a penny has been paid out in tort liability, not after the state settlements and the still-uncertain bill of continuing individual litigation.⁸⁰ But the boast was always illusory in a sense. From the outset, the industry spared no litigation expense in battling tort liability. The costs of litigation always had some impact on the price of tobacco; now the impact is far larger, and, in the future, it could be exorbitant. At no time, however, have litigation-associated costs operated as a rational scheme from a regulatory perspective in affecting the demand for the product. Put another way, tort is a haphazard public health strategy because it is powerfully influenced in the tobacco arena by ever-changing ethical judgments about the scruples of the contestants and extraordinary investments of lawyering activity in attempting to stage an effective appeal to moral sensibilities. It is not a forward-looking strategic device that aims to fine-tune behavior through the medium of liability awards.

B. Litigation and Complementary Control Strategies

In the years immediately preceding the mid-1990s, state and local governments enacted a wide range of regulatory controls over tobacco: Many localities across the nation adopted restrictions on smoking in public places; states and localities enacted a wide variety of controls on retail sales and possession of cigarettes by minors; some states adopted significant excise tax increases on tobacco; many communities restricted advertising of tobacco products; some states engaged in counter-advertising campaigns; and at the federal level, modest measures in some of these areas were enacted.⁸¹

For present purposes, the question is how tobacco litigation intersects with this broad array of regulatory strategies. In one sense, the public health aims and accomplishments of these initiatives highlight the limitations of litigation as a regulatory strategy. Because recent data indicate, at most, a leveling in smoking among teenagers,⁸² and it is well-established that smoking initiation is largely a youth phenome-

80. See *supra* notes 59-68 and accompanying text.

81. For comprehensive discussion of these strategies, see ROBERT L. RABIN & STEPHEN D. SUGARMAN, *REGULATING TOBACCO* (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

82. See NAT'L CENTER *supra* note 6.

non,⁸³ a powerful case can be made that reducing underage smoking is the most salient of tobacco control goals. There is little reason to think that tort litigation contributes much in a direct sense to achieving this objective. Tort awards translate into money judgments to smoking victims rather than compelling retailers to check the age of cigarette purchasers, dictating the character of tobacco advertising, or proscribing the possession of cigarettes.

At the same time, however, it is possible to argue that tort has had an indirect sanctioning effect. To the extent that the tobacco industry expends large sums on litigation defense and liability awards, these costs of doing business lead to increases in the price of cigarettes, which would have a positive impact on reducing minors' smoking. Similarly, as mentioned, the settlements with the states did provide for limited controls on advertising and promotion, as well as generating revenues that will in some instances be used to fund counter-advertising.⁸⁴ In the larger scheme of things, however, it is difficult to make the case for any major inroad in teenage smoking as a result of tort liability. Barring a series of catastrophic judgments against the industry that would create a dramatic upward spiral in the price of tobacco, youth smoking is likely to diminish only when a fine-tuned approach is developed for integrating some combination of stricter retail enforcement, tax increases, and educational initiatives that make smoking appear less "cool."

With respect to adult smokers, arguably the most effective long-term public health measures are the increasingly stringent controls on smoking in the workplace and in places of public accommodation. These controls are likely to lessen the potential impact of second-hand smoke harm, particularly on heavily exposed coworkers and service providers. At the same time, these restrictions may change the habitual behavior of smokers themselves over time: As smoking becomes increasingly time and place-proscribed, the tobacco habit may become more attenuated for any but the most hardcore smokers. In this sphere of conduct control, tobacco litigation, in contrast to legislative activity, has no immediately apparent complementary role to play, putting aside the indirect and somewhat haphazard effect of cata-

83. In the United States, almost 90% of smokers have their first cigarette before the age of 18. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT TO THE SURGEON GENERAL (1994).

84. A major caveat, however. In addition to the diversion of settlement funds to non-tobacco uses mentioned, *supra* note 43 and accompanying text, it appears that the tobacco industry has had considerable success in circumventing the restrictions on magazine advertising aimed at youths. See Alex Kuczynski, *Tobacco Companies Accused of Still Aiming Ads at Youths*, N.Y. TIMES, Aug. 15, 2001, at A1.

strophic tort awards that might dramatically increase the cost of tobacco or force the industry into bankruptcy.

C. Educational Effects

In recent years, public opinion polls have consistently indicated that the public, including the smoking public, is well aware of the health risks of smoking.⁸⁵ Indeed, the industry has used this information to its own end in the tort litigation as a buttress to its argument that smokers assume the risk of smoking-related diseases. In my view, however, tobacco tort proponents cannot lay claim to a significant role in creating a risk-informed public. As far back as 1954, when *Reader's Digest* triggered the first smoking-related cancer scare through graphic summation of the initial scientific studies of the relationship between lung cancer and smoking, the media has played a key role in publishing health findings on tobacco.⁸⁶ In addition, beginning with the U.S. Surgeon General's Report of 1964, the federal government has played an important complementary role.⁸⁷ In fact, it is important to recognize that prior to the filing of *Castano* and the health care reimbursement suits, tobacco tort litigation was a distinctly low-visibility enterprise, and by the time those cases were filed, the health risks of tobacco were already common knowledge.⁸⁸

In contrast, the addictive properties of nicotine had received less attention through the early 1990s; as discussed above, recent litigation has capitalized on this perceived information gap. But here, too, the educational role of tort is hard to assess. The whistleblower-leaked documents that provided support for *Castano* and the state health care reimbursement suits were simultaneously distributed to leading news media, Congressional representatives, the FDA, and public health activists.⁸⁹ In particular, the joint appearance of tobacco executives before the Waxman committee, in which they avowed ignorance of

85. See Hanson & Logue, *supra* note 76, at 1183-86.

86. See Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 111-12 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (attributing the first wave of tobacco litigation in part to a series of *Reader's Digest* articles linking smoking to lung cancer).

87. The Surgeon General publishes an annual report on a selected dimension of the public health concerns related to smoking. And beginning in 1965, Congress mandated health warnings on cigarette packages and advertisements. Many of the Reports, as well as the evolving cigarette warning legislation, are discussed in a historical context in RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* (1996).

88. Philip J. Cook, *The Matter of Tobacco Use*, *SCIENCE*, Dec. 10, 1993, at 1750 (reviewing *SMOKING POLICY: LAW, POLITICS, AND CULTURE*, *supra* note 86).

89. See PRINGLE, *supra* note 3, at 54, 73-76.

the effects of nicotine, focused nationwide attention on nicotine addiction as did the TV documentary, *Day One*.⁹⁰ Thus, it seems fair to say that by the mid-1990s, the channels of public communication of health information concerning the risks of tobacco were overflowing, making it impossible to identify a singularly influential source.

Nonetheless, a meaningful distinction can be drawn between the key sources of public information about the health risks of tobacco, and, beginning in 1993, the most salient source of information on the unfolding narrative concerning the industry's pattern of concealing and misrepresenting its own understanding of those health risks over a period of some thirty years. On this latter score, the determined efforts at pretrial discovery in litigation, such as that pursued by the state of Minnesota in its health care reimbursement suit, did in fact stand out as a source of public information.⁹¹ As in the earlier case of asbestos, the full story of conscious industry disregard for the health effects of its profit-making activity might never have become a part of the public record in the absence of the tort litigation.⁹²

If this is correct, tort law in the tobacco context is most assuredly public law, not so much because of its social welfare character as a compensatory mechanism, nor for its regulatory character as a medium for establishing proper incentives for safety, but for its contribution to the unfolding documentation of public affairs.

IV. BEYOND TOBACCO: CONCLUDING THOUGHTS

The tobacco litigation has richly rewarded a relative handful of plaintiffs' attorneys, and in doing so, has arguably given them the wherewithal to engage in other mass tort litigation ventures that fit their description of lawyering in the public interest.⁹³ Whether these lawyers have consequently targeted industries, such as gun makers and lead paint manufacturers, that they would otherwise have ignored is another question. At the threshold, one can observe that most of these high-visibility plaintiffs' lawyers have done very well for them-

90. See PRINGLE, *supra* note 3, at 68-9, for discussion of the effect of tobacco executives' appearance before the Waxman committee, *Day One Smoke Screen Segment* (ABC television broadcast, Feb. 28, 1994).

91. For detailed treatment of the Minnesota strategy, see Michael Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999).

92. On asbestos, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985); for a more detailed treatment of the educational effects of tort litigation, see Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2068-70 (2000).

93. *Tobacco Lawyer's Roundtable: A Report From the Front Lines*, 51 DEPAUL L. REV. 541 (2002).

selves in other mass tort litigation, ranging from asbestos to breast implants and diet drugs.⁹⁴ For the past two decades, there has been no shortage of lucrative plaintiffs' work available for those with the requisite expertise in high stakes tort litigation.

Without doubt, the tobacco litigation provided these attorneys with a singular experience in coordinating efforts in document discovery, mapping legal strategies, and negotiating with a particularly intransigent industry. Again, however, entirely apart from tobacco, high profile plaintiffs' attorneys now exchange information through well-developed channels, be it section meetings on special litigation topics or internet communication on individual cases.⁹⁵ It is one thing to observe that tobacco created an occasion for honing their skills by developing and implementing their expertise in a particularly complex venture; it is quite another to conclude that tobacco created a receptivity or capacity for taking on an industry perceived to be litigation-vulnerable that would not have been exercised in any event when other opportunities arose.

Perhaps, however, the tobacco litigation created a singular game plan for attacking a perceived renegade industry that could readily be adapted to successive efforts elsewhere. This might be true if the tobacco litigation involved novel doctrinal strategies or litigation techniques that were immediately transferable.

Initially consider doctrinal matters. The individual tort litigation clearly rested on conventional doctrinal considerations: The salient issues, nearly from the outset, have been whether smokers assume the risk, or in any event, apart from actual knowledge of risk, have relied on industry misrepresentations.⁹⁶ More recently, in framing a theory of recovery, the central question has been whether the documents make out a case of fraud or misrepresentation by the industry.⁹⁷ There has never been a departure from this conventional tort framework, aside from a constitutional detour into the preemption thicket a decade ago,⁹⁸ or serious doubt that these issues raised jury questions

94. See, e.g., the profiles of top-earning plaintiffs' lawyers in Michael Freedman, *Judgment Day*, FORBES, May 14, 2001, at 132-34.

95. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 388-401 (2000) (discussing informal methods of coordination among plaintiffs' attorneys).

96. See Rabin, *supra* note 86, at 122-25.

97. In an earlier phase, the key liability issue was whether the tobacco companies negligently failed to warn. See *id.* at 114-18.

98. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (interpreting the federal cigarette labeling act to preempt state tort claims based on a theory of failure to provide an adequate warning).

rather than developing new law. In fact, the individual-plaintiff cases have been decided case-by-case on the basis of how particular juries resolve what I have elsewhere referred to as this "morality play."⁹⁹ So, it is difficult to discern any advances or innovations in tort doctrine growing out of the nearly half century of tort claims lodged by individual claimants against the industry.

Similarly, the class action tort litigation has foundered, as discussed above, on relatively straightforward considerations of applying rule 23(b)(3) of the Federal Rules of Civil Procedure to a class consisting of anywhere between hundreds of thousands and millions of alleged tobacco victims, depending on whether the aggregation is statewide or nationwide.¹⁰⁰ It is hard to glean novel procedural principles from these cases, and certainly they have not laid a foundation for expansive use by the plaintiffs' bar, because the cases have been nearly uniformly dismissed.

But what of the governmental entity cases? Here the doctrinal innovation has been in bringing health care cost reimbursement claims on behalf of the states based on a variety of theories; perhaps most prominently, as mentioned above, common law claims of unjust enrichment and statutory claims based on various state consumer protection schemes.¹⁰¹ Has there been spillover to other areas? By contrast, the municipal litigation against handgun manufacturers has been based on sharply different considerations. At the most fundamental level, the claims are not principally for cost recovery. The cost recovery component in the handgun cases has rested on attenuated speculation about heightened emergency room expenditures and additional police personnel needs that can be appropriately allocated to industry practices in failing to safeguard against criminal use of handguns.¹⁰² These costs are virtually a throw-in when compared to the state and municipal claims for medical expenditures devoted to treatment of lung cancer and other smoking-related diseases in the tobacco cases.

More fundamentally, the municipal handgun cases have been directed at changing the distributional and design practices of the handgun manufacturers, not at cost recovery. As such, the handgun cases have been based principally on theories of negligent marketing and

99. See Rabin, *supra* note 86, at 122; see also Richard L. Cupp, *A Morality Play's Third Act: Revisiting Addiction, Fraud, and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KANS. L. REV. 465 (1998).

100. See *supra* notes 11-18 and accompanying text.

101. See *supra* note 27-31 and accompanying text.

102. Carolyn Barta *Cities Look to Courts in Fight Against Gun-Related Crimes*, DALLAS MORNING NEWS, June 6, 1999, at 1A.

public nuisance.¹⁰³ At this point, there is serious doubt about the viability of these claims.¹⁰⁴ But whether or not handgun litigation ultimately proves successful, it relies on doctrinal claims that cannot trace a lineage to the governmental tobacco litigation. The theories have no carryover.

Moreover, in both the handgun and lead paint arenas, there are serious causation issues that once again sharply separate these ventures from tobacco. Indeed, when causal issues have been salient in the tobacco cases, they have operated as a *barrier* to recovery, in particular, the no-proximate-cause dismissals of third-party health insurer and pension fund claims,¹⁰⁵ rather than developing a technique that might play a positive role for litigation-minded social reformers. In fact, in the handgun area, the proximate cause inquiries are still more vexing, because the injured party is further removed from the industry than in tobacco: Consider the chain of responsibility from manufacturer to municipality running through distributors, retailers, and gunshot victims.

From a causal perspective, lead paint litigation seems to have even less to do with tobacco. Here, the main issue is cause-in-fact rather than proximate cause. The main issue is identifying the manufacturers whose products are in fact responsible for risks from peeling and flaking lead paint chips, often in houses and apartments of rather ancient vintage, characterized by multiple layers of paint and no corresponding documentation of paint suppliers.¹⁰⁶ No comparable issues of product identification are encountered in the tobacco arena, where market share liability of tobacco products posing identical health risks alleviates any causal identification problems.¹⁰⁷

103. For discussion of the nuisance theory, see David Kairys, *The Governmental Handgun Cases and the Elements of Public Nuisance*, 32 CONN. L. REV. 1175 (2000). For discussion of the negligent marketing theories, see Judge Jack Weinstein's opinion in *Hamilton v. Accu-tec*, 62 F. Supp. 2d 802 (E.D.N.Y.1999).

104. For a recent discussion of municipal handgun litigation, see John G. Culhane & Jean M. Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287 (2001). The principal private tort suits based on negligent marketing and distribution theories have been dismissed, see *Merrill v. Navegar*, 28 P.3d 116 (CA 2001); *Hamilton v. Beretta USA Corp.* 750 N.E.2d 1055 (N.Y. 2001); *but see Smith v. Bryco Arms*, N.M. App. (2001), Docket No. 20,389, an intermediate court of appeals case reinstating a design defect products liability claim (based on inadequate safety features) in a case involving a gun shot wound suffered by a teenager when his friend injured him with a gun they thought was unloaded.

105. See *supra* text accompanying note 45.

106. For a highly critical view of the lead paint litigation venture, see Michael Freedman, *Turning Lead into Gold*, FORBES, May 14, 2001, at 122-26.

107. The health risks from the various brands of cigarettes would be regarded as "fungible" within the meaning of *Sinchell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980), *cert denied* 449 U.S. 912

In these post-tobacco ventures, as well as others that might be discussed,¹⁰⁸ if there is a lineage worth noting at all, it is perhaps, as critics have pointed out, the sheer force (and fear) of high stakes litigation coercing an industry to the bargaining table where compensation and some forms of remedial action can be extracted.¹⁰⁹ If, in the final analysis, this is the legacy of the tobacco litigation, it is surely an ironic state of affairs. For four decades, Big Tobacco used its enormous resources to beat down every effort by litigants to secure compensation, usually by imposing such heavy litigation costs that the cases were dismissed far short of the courthouse door. Should one cry “foul” and invoke separation of powers rhetoric when the tables are turned? Are frivolous litigation ventures, as measured against the current framework of tort principles, beyond the competence of the judiciary to weed out at a tolerable cost to society? These are weighty questions, but the tobacco litigation itself, in my view, does not supply an affirmative answer.

(1980) (applying market share liability to the manufacturers of DES, after finding that essentially the same risk was associated with each manufacturer’s version of the drug). In tobacco cases, there are sometimes causal issues of another sort; namely, whether the type of lung cancer suffered by the plaintiff is associated with smoking. But this issue has no analogue in the other class action litigation discussed here.

108. See e.g., Bob Van Voris, *Ritalin Class Actions: Fast Start, Big Stumble*, NAT’L. L.J., Aug. 6, 2001, at A1 (class action litigation against manufacturer of drug aimed at alleviating attention deficit disorders and hypertension in youths); Randall Smith and Jerry Markon, *Note to Suers of Analysts: Rough Road Ahead*, WALL ST. J., Aug. 3, 2001, at C1 (involving class action securities fraud litigation); Hanoch Dagan and James White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 355 (2000) (suggesting that brewers, distillers, and producers of fatty foods may be next in line for suit).

109. See Dagan & White, *supra* note 108 (taking the tobacco litigation as a model for the recent pattern of litigation and settlement).

